

2007-5063, -5064, -5089

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**FRANK P. SLATTERY, JR., on behalf of himself and on behalf of all other
similarly situated shareholders of Meritor Savings Bank,**

Plaintiff-Cross Appellant,

and

**STEVEN ROTH,
and INTERSTATE PROPERTIES,**

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

**Appeal from the United States Court of Federal Claims in 93-CV-280,
Senior Judge Loren A. Smith.**

**BRIEF FOR PLAINTIFF-CROSS APPELLANT
FRANK P. SLATTERY, JR.**

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November 20, 2007

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CERTIFICATE OF INTEREST OF PLAINTIFF - CROSS-APPELLANT
FRANK P. SLATTERY, JR.

Counsel for the plaintiff Frank P. Slattery Jr., certifies the following:

1. *The full name of every party or amicus represented by me is:*

Frank P. Slattery Jr., on behalf of Meritor Savings Bank, for himself and for all other shareholders of Meritor Savings Bank.

2. *The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:*

The named plaintiff brings this action in lieu of the FDIC on behalf of Meritor Savings Bank in the interest of all Meritor shareholders.

3. *All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me.*

There is no such corporation as listed in paragraph 3.

4. *The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:*

Winston & Strawn LLP (Thomas M. Buchanan, Eric W. Bloom, Peter Kryn Dykema, Robert A. Berger).

Dated: November 20, 2007

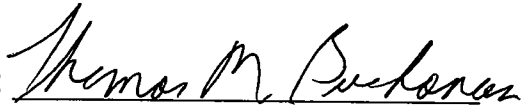
By: 
Thomas M. Buchanan

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for Plaintiff-Cross Appellant ("Plaintiff") states that he is unaware of any other appeals from this civil action that have been before this or any other appellate Court, but that issues raised by this appeal overlap with issues raised in other Winstar cases.

JURISDICTIONAL STATEMENT

The Court of Federal Claims had jurisdiction over this Tucker Act suit under 28 U.S.C. § 1491. The Government's contention that the non-appropriated funds instrumentality ("NAFI") doctrine defeats jurisdiction was correctly rejected by the trial court; moreover, the argument was waived under the reasoning of the Supreme Court in Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

The trial court correctly ruled that it lacked jurisdiction over the claims of Plaintiffs-Cross Appellants Roth, et al. ("Intervenors").

This Court possesses jurisdiction of this timely cross-appeal from a final judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF ISSUES

The briefs filed by Defendant-Appellant United States ("the Government"), Intervenors, and *Amicus Curiae* Federal Deposit Insurance Corporation ("FDIC") raise the following issues:

1. Whether the NAFI doctrine is applicable to FDIC and whether the Government timely raised the NAFI issue in the first place;
2. Whether the trial court correctly construed the parties' contract;
3. Whether the trial court's factual findings, upon which its contract interpretation is based, are clearly erroneous;
4. Whether the trial court's findings of breaches are clearly erroneous;
5. Whether the trial court abused its discretion, or committed clear error, in calculating Meritor's¹ damages;
6. Whether the trial court correctly ruled that the Government cannot reduce Meritor's damages by forcing Meritor to reimburse the Government for costs incurred in breaching the contract; and
7. Whether the trial court had jurisdiction over Intervenors' claims.²

In addition, specific findings made by the trial court present the issues that are the subject of Meritor's cross-appeal, namely:

8. Whether, on the unique facts of this case, Meritor is entitled to disgorgement of the money FDIC saved as a result of the merger;

¹ We adopt the naming convention of the other parties to the appeal, referring to both Meritor and its predecessor (the Philadelphia Savings Fund Society) as "Meritor."

² Intervenors' brief seeks to raise an issue as to the identity of the shareholders to whom FDIC-Receiver should distribute the fruits of this proceeding. We agree with the trial court below, however, that neither it nor this Court can reach the issue presented for want of jurisdiction. See A000004-7.

9. Whether a disgorgement award should include the earnings that the Government realized through the use of the money it saved as a result of Meritor's contract performance.

STATEMENT OF THE CASE – FINDINGS BELOW

Plaintiff supplements the Government's Statement, as follows.

I. Pretrial

This breach of contract case arose out of a 1982 assisted merger in which FDIC promised to allow Meritor to book, as goodwill, the net liabilities of the acquired thrift.³ Plaintiff's complaint alleged that, during the years that followed, the Government repeatedly broke this promise, ultimately causing Meritor's seizure and liquidation in December 1992. Because FDIC's treatment of Meritor's goodwill was not dictated by statute – unlike the fact pattern in the Winstar cases – resolution of Plaintiff's claims would require the trial court not only to interpret the government's goodwill promise, but also to determine whether the government breached that promise, a question that largely turned on issues of intent. Extensive discovery was devoted to both issues.

³ The 1982 agreement provided:

3. The difference between the liabilities assumed and the total of the market value of the Western assets, less reserves, may be treated as goodwill and amortized on a straight-line basis up to fifteen (15) years.

A400947.

Prior to trial, the Government moved for partial summary judgment. In briefing that motion, the parties presented contending interpretations of the Government's goodwill commitment. In denying summary judgment, the trial court held, *inter alia*, that "[a]t issue in this case is whether there was an agreement to treat goodwill as an asset as real as cash. This is a factual determination." Slattery v. United States, 35 Fed. Cl. 180, 186 (1996) (A000066).

In its summary judgment papers, the Government also argued, as it does here, "that regardless of whether or not the goodwill was counted, Meritor was in such a 'precarious' and 'progressively grim' financial condition that the FDIC had 'adequate bases' for" taking the actions it did. A000065. Again, the trial court found that triable fact issues were presented: "The government appears to have misunderstood plaintiffs' argument. Plaintiffs are not arguing that FDIC was prohibited from taking any supervisory action in regards to Meritor. They merely contend that any such action must include the counting of goodwill or be a breach of the contract to count such goodwill." Id.

The Government has not appealed the trial court's denial of summary judgment.

